Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

WILHEMINA SIMMONS,

Petitioner,

v.

K-MART CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Seventh Circuit Court of Appeals erred when it split with the Third Circuit Court of Appeals by considering the dollar amount of Petitioner Wilhemina Simmons's Proof of Claim in affirming the lower courts' rulings that Petitioner's Proof of Claim—which was filed one day after the initial claim Bar Date due to a clerical error—could not be deemed timely filed pursuant to the "excusable neglect" doctrine established by Federal Rule of Bankruptcy Procedure 9006(b) and *Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993).

2) Whether the Seventh Circuit erred in affirming the lower courts' denials of Petitioner's Rule 9006(b) Motion based on a narrow application of "excusable neglect," contrary to the liberal construction mandated by this Court's decision in *Pioneer*.

3) Whether the Seventh Circuit erred by affirming the lower courts' rulings based on the mistaken belief that it had not been provided, and therefore was unable to consider, certain unpublished opinions of the Bankruptcy Court which supported Petitioner's argument that the period of time between the late filing and the subsequent Rule 9006(b) Motion is irrelevant to the "excusable neglect" analysis, when those opinions were actually included in the attachments to Petitioner's appellate brief.

4) Whether the Seventh Circuit erred by affirming the lower courts' rulings that a Supplemental Bar Date should not apply to Petitioner's Proof of Claim based on a factual distinction that had no basis in the record and which was not applied to other similarly situated claimants.

LIST OF PARTIES

The Petitioner to this Honorable Court for a writ of certiorari is Wilhemina Simmons. Petitioner is a citizen of the U.S. Virgin Islands. Petitioner is a pre-petition creditor of K-Mart Corporation based on a personal injury claim.

The Respondent is K-Mart Corporation, as debtor in possession. K-Mart filed its Chapter 11 bankruptcy case on January 22, 2002 in the United States Bankruptcy Court for the Northern District of Illinois. K-Mart's bankruptcy proceedings are ongoing.

CORPORATE DISCLOSURE

Petitioner is an individual with no corporate parent or subsidiary requiring disclosure pursuant to Supreme Court Rule 29.6.

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OPINIONS BELOW

This Petition arises from the denial of two motions Petitioner brought in the United States Bankruptcy Court for the Northern District of Illinois ("Bankruptcy Court"). On October 21, 2002, Petitioner filed a Motion to Have her Proof of Claim Deemed Timely Filed pursuant to the "excusable neglect" provision contained in Rule 9006(b) of the Federal Rules of Bankruptcy Procedure ("Rule 9006(b) Motion"). The Bankruptcy Court heard argument on November 19, 2002 and denied Petitioner's Rule 9006(b) Motion by Order dated November 26, 2002. No written opinion was issued. On January 14, 2003, Petitioner moved to have her claim included in a Supplemental Bar Date that was established upon motion of the debtor, K-Mart, for personal injury claimants who had not received Debtor's original bar date notice. On February 5, 2003, the Bankruptcy Court heard argument and denied this Motion as well. No written opinion was issued. The grounds for the Bankruptcy Court's oral rulings with respect to both Motions are discussed in detail in the District Court and Seventh Circuit opinions attached in the Appendix hereto.[1]

Petitioner appealed both of the Bankruptcy Court's rulings to the United States District Court for the Northern District of Illinois. The District Court consolidated both of Petitioner's appeals and affirmed both of the Bankruptcy Court's rulings in a single Memorandum Opinion and Order dated October 27, 2003. (App. at 15-24.)

Petitioner appealed the District Court's rulings to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit heard oral argument on April 9, 2004 and issued an Opinion and Order affirming the judgment

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[1] The transcripts from the relevant hearings are included in the Appendix to Petitioner's opening appellate brief to the Seventh Circuit.

of the District Court on August 27, 2004. (*Id.* at 1-14.) The Seventh Circuit's Opinion is reported at 381 F.3d 709.

JURSIDICTION

Pursuant to 28 U.S.C.A. § 1254(1), Petitioner seeks the grant of a writ of certiorari to obtain review of the Order entered by the Seventh Circuit on August 27, 2004. (App. at 14.)

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Federal Rule of Bankruptcy Procedure 9006(b). Petitioner asserts that the Seventh Circuit misapplied Rule 9006(b) of the Federal Rules of Bankruptcy Procedure, which provides in relevant part:

> [W]hen an act is required . . . to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion . . . (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr. P. Rule 9006(b).

STATEMENT OF THE CASE

A. Petitioner's Late Claim and the Bankruptcy Court's Decision

The Bankruptcy Court established July 31, 2002 as the deadline for filing proofs of claim in the K-Mart bankruptcy case (the "Bar Date"). (*Id.*) In order to comply with

the Bar Date, Petitioner's counsel timely prepared a Proof of Claim. On July 30, 2002, Petitioner's attorneys instructed their office clerk to send the Proof of Claim by next-day Express Mail. (*Id.* at 2-3.) By mistake, the clerk who completed the Express Mail delivery form checked the box for "second day" delivery, rather than "next day" delivery as instructed by Petitioner's counsel. (*Id.*) The office clerk also neglected to deliver the Proof of Claim to the Post Office until some time after 2:00 p.m.—the deadline for "next day" delivery. (*Id.*) As a result of these clerical errors, Petitioner's Proof of Claim was received and filed on August 1, 2002—one day after the Bar Date. (*Id.*)

The clerk never alerted Petitioner's attorneys to any problems in carrying out their instructions, and Petitioner's attorneys therefore assumed that the clerk had carried out their instructions and that the Proof of Claim would be timely filed. (*Id.*) It was not until September 23, 2002 that Petitioner's attorneys learned of the late filing, when they received a letter from a K-Mart claims examiner dated September 18, 2002. (*Id.* at 3, 17.)[2]

After conducting an investigation and preparing a supporting affidavit, Petitioner's attorneys on October 21, 2002 filed a Motion to Have her Proof of Claim Deemed Timely Filed pursuant to the "excusable neglect" provision contained in Rule 9006(b) of the Federal Rules of Bankruptcy Procedure ("Rule 9006(b) Motion"). (*Id.* at 17.) The Bankruptcy Court heard argument on November 19, 2002 and denied Petitioner's Rule 9006(b) Motion by Order dated November 26, 2002. No written opinion was issued. (*Id.* at 3-4, 17.)

Shortly thereafter, on December 11, 2002, Debtors moved for, and were subsequently granted, leave to establish a

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[2] The office clerk responsible for the delivery errors was subsequently terminated.

Supplemental Bar Date of January 22, 2003, based on the omission of certain personal injury claimants from K-Mart's bankruptcy schedules. K-Mart's omission had potentially prevented those claimants from receiving direct mail notice of the original July 31, 2002 claim Bar Date. (*Id.* at 2.) Petitioner had not been included on K-Mart's bankruptcy schedules, nor had she received direct mail notice of the original July 31, 2002 Bar Date. (*Id.* at 2.) While K-Mart had mailed notice of the original Bar Date to Petitioner on May 22, 2002, the notice was sent to an address where Petitioner did not receive mail. (*Id.*)

Based on these facts, Petitioner's attorneys on January 14, 2003 moved to have her claim included in the Supplemental Bar Date. On February 5, 2003, the Bankruptcy Court heard argument and denied Petitioner's Motion based on the Court's conclusion that Petitioner's attorneys were aware of the bankruptcy and could have ascertained the original Bar Date.

Petitioner appealed both of the Bankruptcy Court's rulings to the United Sates District Court for the Northern District of Illinois (the "District Court").

B. The District Court's Decision

The District Court consolidated both of Petitioner's appeals and addressed them in a single Memorandum Opinion and Order dated October 27, 2003. (*Id.* at 16-24.) The District Court affirmed both of the Bankruptcy Court's rulings. (*Id.* at 15.)

The District Court first reviewed the Bankruptcy Court's denial of Petitioner's Rule 9006(b) Motion. (*Id.* at 18-21.) It considered the Bankruptcy Court's findings under Rule 9006(b) and the four-factor "excusable neglect" analysis established by this Court's decision in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380,

395 (1993). (*Id.*) Under *Pioneer*, the factors to be considered are: "[1] the danger of prejudice to the debtor, [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." 507 U.S. at 395. (*Id.* at 18.)

With regard to the first factor, the danger of prejudice to the debtor, the District Court concluded that the Bankruptcy Court did not abuse its discretion by finding that the late filing of Petitioner's claim would prejudice K-Mart because the dollar amount of Petitioner's claim ($750,000) was "no small amount" with respect to the total number of claims against K-Mart. (*Id.* at 19.)

With regard to the second factor, the length of the delay and its potential impact on the judicial proceedings, the District Court noted that the Bankruptcy Court did not make any findings of adverse impact attributable to the one-day delay in filing the Proof of Claim. (*Id.* at 20.) However, the District Court observed that the Bankruptcy Court did appear to consider the possible adverse impact on the bankruptcy proceeding attributable to the delay between the one-day late filing of the claim on August 1, 2003, to the filing of Petitioner's Rule 9006(b) Motion on October 21, 2003. (*Id.*) The District Court then concluded that the Bankruptcy Court's apparent consideration of the delay element of the excusable neglect analysis was not clearly erroneous. (*Id.*)

Next, the District Court considered the third factor, the reason for the delay. (*Id.* at 20-21.) The Court determined that the Bankruptcy Court's conclusion that the delay was within Petitioner's control was not erroneous. (*Id.*) The District Court based that determination on the fact that the claim was not sent for filing until the day before the July 31, 2002 deadline. (*Id.* at 21.)

Finally, the District Court considered the good faith element. (*Id.*) It acknowledged that it was unclear whether the Bankruptcy Court had considered that factor. (*Id.*) However, the District Court concluded that Petitioner's showing of good faith was not strong enough to outweigh the other factors that the Bankruptcy Court specifically considered. (*Id.*) Based on the foregoing analysis, the District Court affirmed the Bankruptcy Court's denial of Petitioner's Rule 9006(b) Motion. (*Id.*)

The District Court then turned to the Bankruptcy Court's denial of Petitioner's Motion to be Included in the Supplemental Bar Date. (*Id.* at 22-24.) It began by noting that the Supplemental Bar Date was established to remedy due process concerns with respect to those claimants who, like the Petitioner, were not included in K-Mart's schedules of assets and liabilities and who therefore were not notified of the original deadline for filing proofs of claim. (*Id.* at 22.) Although the District Court acknowledged that K-Mart had not included Petitioner in its schedules, it held that her attorney's alleged actual notice of the original Bar Date should be imputed to her. (*Id.* at 22-23.) Neither the Bankruptcy Court nor the District Court made any inquiry as to whether counsel for any or all of the other claimants who were allowed to file by the Supplemental Bar Date, much less whether those claimants themselves, also had actual notice of the initial Bar Date. Nevertheless, the District Court held that that the Bankruptcy Court did not err by denying Petitioner's Motion. (*Id.* at 23-24.)

Petitioner appealed the District Court's decision to the Seventh Circuit.

C. The Seventh Circuit's Decision

The Seventh Circuit heard oral argument on April 9, 2004, and affirmed the District Court's decision by Order

dated August 27, 2004. (*Id.* at 14.) In doing so, it first conducted a *de novo* review of the District Court's analysis of excusable neglect under Rule 9006(b) according to the factors established by *Pioneer*. (*Id.* at 5-11.)

The Seventh Circuit began by reviewing the Bankruptcy Court's analysis of the prejudice factor. (*Id.* at 5-7.) It observed that the Bankruptcy Court did not address certain facts cited by Petitioner in support of her contention that the one-day late filing did not prejudice K-Mart. (*Id.* at 5-6.) These included the fact that, at the time of the late filing, K-Mart had not yet filed its plan of reorganization, as well as the fact that additional claims were still being filed pursuant to the Supplemental Bar Date. (*Id.*) In light of these issues, the Seventh Circuit remarked that it "[did] not find the Bankruptcy Court's reasoning overwhelmingly persuasive." (*Id.* at 7.) Nevertheless, it concluded that the Bankruptcy Court was in the best position to assess the prejudice factor and therefore the Seventh Circuit affirmed the Bankruptcy Court's finding that there was a risk of prejudice to K-Mart because the dollar amount of Petitioner's claim was "no small amount." (*Id.* at 6.) *Importantly, the Seventh Circuit also suggested that the outcome would have been different had the claim been for $75,000 or $80,000, rather than $750,000.* (*Id.*)

Next, the Seventh Circuit considered the length of the delay and its impact on the judicial proceedings. (*Id.* at 7-8.) It began by noting that Petitioner's claim was filed only "one day late, a fact which seems to support the grant of her Rule 9006(b) Motion." (*Id.* at 7.) It then noted that Petitioner filed her Rule 9006(b) Motion eighty-one days after the initial Bar Date, a fact which the Bankruptcy Court had emphasized. (*Id.*) Notably, Petitioner had attached to her appellate brief three unpublished decisions in which the Bankruptcy Court had granted "late claims motions" filed as late as seventy days after the applicable

Bar Date. Despite this, the Seventh Circuit held that it lacked the ability to consider these decisions because Petitioner did not provide copies of them to the Seventh Circuit with her brief. But on this point the Seventh Circuit was plainly in error: the decisions were included in Petitioner's bound volume which included her brief, appendix, and addendum of authority. The Seventh Circuit apparently overlooked the decisions, and as a result its only comment on them was that a seventy-day delay was "not as tardy" as Petitioner's eighty-one day delay. (*Id.* at 8.)

The Seventh Circuit next considered the reason for the delay, which it characterized as an "immensely persuasive" factor in this case. (*Id.* at 9-10.) Its analysis was simply that Petitioner did not file the claim until the last minute, that the mailing responsibilities were left to a clerk, and that Petitioner did not verify whether her claim arrived on time. (*Id.*) While the Court concluded that those reasons were poor ones, it never compared Petitioner's reasons to those in the *Pioneer* decision or other cases decided under Rule 9006(b). (*Id.*)

Finally, the Court considered Petitioner's good faith. (*Id.* at 10-11.) The Court acknowledged that the Bankruptcy Court had not even addressed Petitioner's good faith and that Petitioner's counsel had in fact attempted to file her claim on time. (*Id.* at 10, n.3.) However, it focused again on the length of the delay and reason for the delay in deciding that Petitioner's efforts "cannot be called extraordinary or even particularly diligent." (*Id.* at 10.) Accordingly, it held that the good faith factor was inconclusive. (*Id.*)

Based on the foregoing analysis, the Seventh Circuit concluded that the Bankruptcy Court's denial of Petitioner's Rule 9006(b) Motion was not an abuse of discretion. (*Id.* at 10-11.) In explaining that finding, the Court

commented that "ultimately this mistake is attributable to no one except Simmons." (*Id.* at 11.)

The Seventh Circuit then turned to the denial of Petitioner's motion to be included in the Supplemental Bar Date. (*Id.* at 11-13.) The Court acknowledged that Petitioner was similar to the other claimants to whom the Supplemental Bar Date applied in that she was not listed on K-Mart's schedules and never physically received notice of the initial Bar Date. (*Id.* at 11.) However, it concluded that she could be distinguished from the other claimants on the grounds that her counsel had actual knowledge of the initial Bar Date and therefore the Bankruptcy Court's denial of Petitioner's motion was not an abuse of discretion. (*Id.* at 12.) The Seventh Circuit reached that conclusion despite the fact that there was nothing in the record as to whether any of the other claimants to whom the Supplemental Bar Date did apply may also have had actual knowledge of the original Bar Date, and should therefore not have been afforded more favorable treatment.

WHY THE PETITION SHOULD BE GRANTED

I. The Seventh Circuit Erred By Splitting With The Third Circuit And Considering The Dollar Value Of Petitioner's Claim As Part Of The Excusable Neglect Analysis.

The Seventh Circuit based its critical finding of prejudice in this case on the fact that Petitioner's claim was for "no small amount," and specifically stated that the case may have turned out differently had Petitioner's claim been for $75,000 or $80,000 rather than $750,000. (*Id.* at 6.) This aspect of the Seventh Circuit's opinion not only amounts to a rejection of *Pioneer*, it also creates a split with the Third Circuit as to whether the dollar amount of a claim should be considered as part of the prejudice element of the

excusable neglect analysis. *O'Brien Environmental Energy, Inc. v. NRG Energy, Inc. (In re O'Brien Environmental Energy, Inc.)*, 188 F.3d 116, 126 (3d Cir. 1999).

In *O'Brien*, the Third Circuit held that the size of a late-filed claim and the loss of the windfall that its allowance would cause to other creditors are not facts that should be considered in assessing the *Pioneer* prejudice factor. In so holding, the Third Circuit noted that "[o]ther circuits too have held that prejudice is not merely the loss of an advantageous position, but must be something more closely tied with the merits of the issue." *O'Brien*, 188 F.3d at 127. Indeed, if the size of a late claim and its dilution of the distribution pool constituted prejudice, the Third Circuit recognized, then "virtually all late filings would be condemned by this factor." *Id.* at 126. To avoid the inequity of such an approach, the Third Circuit employed a five-factor analysis for prejudice which considered, *inter alia*, the impact that the late claim would have on the administration of the case, whether the plan was filed or confirmed with the existence of the claim, and whether the late filing would upset the plan's economic model. *See id.* at 127. While the Third Circuit also took into account claim size, it did so not in a vacuum, but only with *respect to the rest of the estate. See id.*

Although Petitioner explained to the Seventh Circuit why the *O'Brien* prejudice factors weighed in her favor, her arguments fell on deaf ears. The Seventh Circuit relied solely on the Bankruptcy Court's curt observation that her claim was "for no small amount." (App. at 6.)

This refusal to look beyond the dollar amount and consider the full range of issues relevant to prejudice was reversible error. Had the Seventh Circuit fully analyzed the issue, it would have had no choice but to concede that, in fact, the size of Petitioner's claim was insignificant with respect to rest of the claims in the K-Mart estate. The

Seventh Circuit appeared to recognize this when it acknowledged, "it is true that Simmons's claim represents only a small fraction of the approximately $6 billion total of unsecured claims against K-Mart. . . ." *Id.* However, the Court's analysis ended there. Had it followed the issue to its logical conclusion, it would have also understood that because Petitioner's claim is unsecured, she would have only received a fraction of $750,000 if her claim were allowed. But instead, the Seventh Circuit chose not to give Petitioner the benefit of the analysis she deserved, and erroneously found that the mere observation of claim size as "no small amount" constituted a sufficiently reasonable analysis of prejudice. (*Id.* at 7.)

The Seventh Circuit also reasoned that if all such claims were allowed, "K-Mart could easily find itself faced with a mountain of such claims, with a corresponding price tag in the millions of dollars." (*Id.* at 6.) However, this was rank speculation. Even more fundamentally, nowhere did the Seventh Circuit ever explain how prejudice to the bankruptcy proceeding would materialize even if allowing Petitioner to file her claim one day late did in fact lead to more claims being filed. After all, the K-Mart bankruptcy involves $6 billion in claims. Petitioner's claim is unsecured. It is difficult to envision how K-Mart's reorganization would be jeopardized by a few million extra dollars in unsecured claims which stand to receive only pennies on the dollar. *See O'Brien*, 188 F.3d at 128. Moreover, the prejudice that the courts in this case were alluding to is not any type of prejudice to K-Mart, but instead is the mere loss of the windfall that other creditors stand to receive only because unfortunate *bona fide* creditors filed their claims late.

For all of the foregoing reasons, the Seventh Circuit's prejudice analysis in this case is not only fundamentally unsound, it is a departure from established law that

squarely conflicts with the sound approach espoused by the Third Circuit in *O'Brien*. The Seventh Circuit erred by finding that the Bankruptcy Court's "no small amount" analysis was sufficiently reasonable under Rule 9006(b) and *Pioneer*. If its decision is allowed to stand, the letter and spirit of Rule 9006(b) and *Pioneer* will be eviscerated in the Seventh Circuit. Its decision should be reversed.

2. The Seventh Circuit Failed To Follow This Court's Mandate That Rule 9006(b) And *Pioneer* Should Be Liberally Construed.

The Seventh Circuit also erred in applying *Pioneer* and Rule 9006(b) when considering the reason for the delay. Its analysis was simply that Petitioner did not file the claim until the last possible day, that the mailing responsibilities were left to a clerk, and that Petitioner did not verify whether her claim arrived on time. (App. at 9-10.) It also noted, although in its consideration of good faith, that her efforts were not "extraordinary or even particularly diligent." (*Id.* at 10.) It concluded that "ultimately this mistake is attributable to no one except Simmons." (*Id.* at 11.)

In that analysis, the Seventh Circuit erroneously applied a higher standard than that established by Rule 9006(b) and *Pioneer*. It affirmed the disallowance of Petitioner's claim based upon nothing more than an innocent mistake and the size of the claim. It lost sight of the fact that a mistake is not fatal under Rule 9006(b). To the contrary, mistakes are specified as an allowable form of excusable neglect.

This Court requires a "flexible understanding of 'excusable neglect' [that] accords with the policies underlying Chapter 11 and the bankruptcy rules." *Pioneer*, 507 U.S. at 389. That is because "[w]hereas the aim of a Chapter 7 liquidation is the prompt closure and distribution of the

debtor's estate, Chapter 11 provides for reorganization with the aim of rehabilitating the debtor and **avoiding forfeitures by creditors**." *Id.* (emphasis added). Indeed, the Seventh Circuit's own precedents also require a liberal interpretation of excusable neglect in light of *Pioneer*. *See Robb v. Norfolk & Western Railway Co.*, 122 F.3d 354, 360-62 (7th Cir. 1994); *see also In re Singson*, 41 F.3d 316, 318 (7th Cir. 1994).

K-Mart's case is proceeding under Chapter 11 and therefore the courts in this case should have applied the *Pioneer* factors and Rule 9006(b) liberally, with the goal of avoiding forfeiture of Simmons' claim. Their focus should have been whether any true damage to K-Mart's reorganization would occur if her claim were allowed. They failed to do so.

The Supreme Court in *Pioneer* explained that even mistakes within a claimant's control may constitute excusable neglect under Rule 9006(b):

> [B]y empowering the courts to accept late filings "where the failure to act was the result of excusable neglect," Rule 9006(b), Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by **inadvertence, mistake, or carelessness**, as well as by intervening circumstances beyond the party's control.

Pioneer, 507 U.S. at 388 (emphasis added). So too, in *Singson*, the Seventh Circuit itself explained that the circumstances surrounding a late filing need not be "extraordinary" in order to merit relief under Rule 9006(b). *See Singson*, 41 F.3d at 318.

In this case, the Seventh Circuit found fault with Petitioner because she did not file her claim earlier. However, no claimant is ever required to file a claim early; one must only file by the deadline. Therefore, failing to

send a claim for filing *prior* to the deadline is not in and of itself indicative of fault. Here, the mistake was nothing more than a clerk's failing to follow instructions by sending the claim via second day mail instead of overnight delivery, and then not informing the attorneys of this fact. If that is not "excusable neglect," then what is?

Also overly strict, and therefore contrary to the liberal construction required to be applied to Rule 9006(b), is the Seventh Circuit's implicit holding that "delegat[ing] the mailing responsibilities to a clerk" was somehow unreasonable or indicative of fault. (App. at 9.) To the contrary, entrusting mailing to a clerk is a common and acceptable practice. If the Seventh Circuit's decision is allowed to stand, attorneys will have to choose between depositing claims and other papers in the mail (and potentially performing other clerical duties) themselves or running the risk of being viewed as inexcusably negligent because they delegated that clerical function to a clerk.

The Seventh Circuit also erred by finding no excusable neglect based on the fact that Simmons did not verify whether her claim had been timely filed. That fact is not relevant under Rule 9006(b) or *Pioneer* because it has nothing to do with the reason why the claim was filed one day late.[3] For this reason, too, the Seventh Circuit failed to give Petitioner the benefit of the liberal construction of "excusable neglect" to which she was entitled under *Pioneer*.

The unreasonableness of the Seventh Circuit's analysis, and the schism it has created with the regard to the

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[3] This error is part of a larger error in the courts' analysis in this case: the courts did, but should not have, considered the time that passed from the bar date to the date that the motion was filed rather than simply considering the reason for the delay in filing the claim itself and the length of delay in filing the claim. *See infra*. Section 3.

appropriate standard, becomes evident when one compares the Seventh Circuit's approach in this case to other decisions under Rule 9006(b). For example, in *In re Cendent Corp. PRIDES Litigation*, 235 F.3d 176 (3d Cir. 2000), a claimant's proof of claim was filed only five days, or three business days, late due to unforeseeable failure in the claimant's usual mailroom procedures. *Id.* at 183. Although the proof of claim was timely prepared and tendered to the mailroom for mailing well within the claim bar date, the proof of claim was not timely mailed either due to unforeseeable error by the mailroom employees or simply due to a failure in the mailroom's ordinary operating procedures. *Id.* The Court of Appeals reversed the District Court's order denying the claimant's motion to have its claim deemed timely filed. *Id.* at 184. In support of its holding, the Court of Appeals found that the District Court's failure to consider the *Pioneer* factors in considering the claimant's late-filed claim was an abuse of discretion that constituted reversible error. *Id.* at 182-83. The Court of Appeals further held that the filing of the proof of claim five days, or three business days, late "could not have had any real impact on the judicial proceedings." *Id.* at 183. Finally, the Court of Appeals held that the failure of the mailroom personnel to timely mail the proof of claim in accordance with ordinary procedures constituted excusable neglect. *Id.* at 184.

Similarly, in *Pioneer*, a claimant filed a late claim and then filed a motion to have it deemed timely filed under Rule 9006(b). The claimant and its attorney explained that the claimant had forwarded its complete file to its attorney regarding the bankruptcy case. The file included a notice to creditors of the deadline for filing claims. However, there was an issue as to whether the notice of the bar date was conspicuous enough on the face of the notice. A few months after receiving the file, the attorney left his law firm. For approximately three weeks thereafter the

attorney did not have access to his copy of the case file. Approximately one week later the bar date passed, but no claim was filed on behalf of the claimant. In arguing excusable neglect, the claimant's attorney claimed that he and his client were unaware of the bar date and that during the dates relevant to the matter the attorney "was experiencing a 'major and significant disruption' in his professional life" which caused the late filing. *See Pioneer*, 507 U.S. at 384. The Supreme Court decided that under those circumstances and in light of the issue with the clarity of the notice, the claim should be deemed timely filed. *See id.* at 398-99.

The reason for the delay in Petitioner's case is comparable to that in *Cendant* and less egregious than that in *Pioneer*. Accordingly, the Seventh Circuit's decision, in which it emphasized the reason for the delay (App. at 9-10), should be overturned.

III. The Seventh Circuit Erred By Not Reading The Unpublished Opinions Of The Bankruptcy Court And By Considering The Length Of Time That Passed From The Bar Date To The Filing Of The Rule 9006(b) Motion.

The Seventh Circuit also erroneously focused on the length of time that passed from the initial Bar Date to the filing of the Rule 9006(b) Motion. In her briefs, Petitioner cited three unpublished decisions in which the Bankruptcy Court deemed late filed claims to be timely filed even though the delay in filing the respective Rule 9006(b) motions was comparable to that in Petitioner's case. Specifically, two claimants filed their motions 70 days after the applicable Bar Date and one filed her motion 48 days after the applicable Bar Date. In each of those cases, the Bankruptcy Court held that the delay in filing the motion was minimal and nonprejudicial. Petitioner filed

her motion 81 days after the applicable Bar Date, but before the Supplemental Bar Date, yet the Seventh Circuit without explanation held that the delay was too lengthy and prejudicial in her case.

Crucially, the Seventh Circuit's finding of prejudice was based on its professed lack of ability to consider the unpublished decisions, allegedly because "Simmons failed to include the court's unpublished orders addressing these claims in her appendix to this court . . . ." (App. at 8.) However, Petitioner did include the unpublished opinions in the bound volume that contained her brief, appendix, and addendum of statutory provisions and rules. The unpublished opinions are also identified on page ii of the Table of Contents of that bound volume. Clearly, the unpublished opinions were provided to the Seventh Circuit. If it had merely consulted the Table of Contents or reviewed the exhibits, it would have been able to read the opinions and verify the veracity of her argument.

Instead, the Seventh Circuit merely noted, dismissively, that even if it were to consider those opinions, they would be distinguishable from Petitioner's circumstances because those motions "were not as tardy as Simmons's." (*Id.* at 8.) While it is true that Petitioner's motion was filed eleven days later than those of two of the movants, under *Pioneer* an eleven-day difference is not *per se* prejudicial. Under *Pioneer*'s liberal standard, the unpublished decisions Petitioner submitted deserved more analysis than the Seventh Circuit gave them.

On a more fundamental level, the delay in the filing of the Rule 9006(b) Motion should not have been considered at all. No authority has been cited by the Bankruptcy Court, the District Court, the Seventh Circuit, or K-Mart for the proposition that it is even appropriate to consider the time that passed between the Bar Date and the date on which Simmons filed her Motion. They also cited no

authority to support the decision that the time that passed was too long. In fact, in *Farley, Inc. v. Ohio Bureau of Workers' Compensation*, 213 B.R. 138, 142 (N.D. Ill. 1997), the Northern District of Illinois affirmed a decision of the Bankruptcy Court in which the Bankruptcy Court explained that the "relevant focus for a finding of prejudice was the time period between the Bar Date and the late filing, not the period from the filing date to the filing of the motion to extend time." The Bankruptcy Court further explained that considering time of the filing of the motion would be "confusing a prejudice with a consequence [from the filing of the late claim]." *Id.*

Even those courts that have considered the length of time from a bar date to the filing of a motion seeking an extension have determined that delays greater than or identical to Petitioner's were nonprejudicial. In the Northern District of Illinois, the Bankruptcy Court has determined that a five-month delay in filing a motion for an extension of a bar date was reasonable given the complex nature of the case and a related case. *See In re O'Shaughnessy*, 252 B.R. 722, 733 (Bankr. N.D. Ill. 2000), (citing *Pettibone Corp. v. Payne (In re Pettibone Corp.)*, 151 B.R. 166, 174 (Bankr. N.D. Ill. 1993) (claimant's ten-month delay between the time it learned of the bankruptcy case to filing a motion for leave to file a late claim was reasonable where the claimant had to retain bankruptcy counsel and investigate the matter)).

The Third Circuit has also considered the impact of the time between the late filing and the motion to extend time under circumstances almost identical to those in Petitioner's case, and found that the length of the delay in filing the motion was insignificant for the purposes of

Pioneer.[4] *See O'Brien*, 188 F.3d at 129-30. In *O'Brien*, the Third Circuit reviewed the bankruptcy court's analysis of the length of the delay and explained why it was erroneous:

> Finally, we consider the length of the delay and its impact on the judicial proceedings. The Bankruptcy Court declared the delay and its impact "significant," because the requested relief in this case occurred after the effective date of the Plan and thus "would undermine the stability of the confirmation process." The Bankruptcy Court, however, did not really address the length of the delay. The actual delay was approximately two months, and takes on significance mainly because of the intervening occurrence of the effective date of the Plan on April 30, 1996. As the District Court noted, the *delay associated with Manus's requesting relief* from the March 8 order—which occurred approximately *ten weeks* after the March 8 hearing, approximately *four weeks* after Manus was aware that its claim was waived, and approximately two weeks after the effective date of the *Plan—is not significant in an absolute sense.*
>
> * * *
>
> [T]he delay factor in the excusable neglect inquiry should not be held to turn entirely on the urgency created by the debtor's time line. *Such an approach makes the two month delay seem significant, whereas a similar delay, or even a much longer delay* in a case where the debtor proceeds more expeditiously to resolve outstanding claims under its contracts, or

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[4] In *O'Brien*, the Third Circuit considered a motion brought by a creditor who had failed to file a timely claim for the cure of defaults in connection with a contract assumed by the Debtor. *See O'Brien*, 188 F.3d at 120-21.

> allows itself more time between confirmation and closing under its plan, *would be insignificant.*

Id. (emphasis added).

Petitioner's situation is like that described in *O'Brien*, in which a delay of even longer than two months would be insignificant. The actual claim was received by K-Mart only one day late. The Seventh Circuit refused to acknowledge that a one-day delay could not possibly prejudice K-Mart or its estate. *See Pioneer*, 507 U.S. at 384 (proof of claim filed 20 days late would be deemed timely); *In re Cendent Corp. PRIDES Litigation*, 235 F.3d at 183 (three business day delay in filing proof of claim could not have any real impact on judicial proceedings); *In re Dartmoor Homes, Inc.*, 175 B.R. 659, 666-67 (Bankr. N.D. Ill. 1994) (proof of claim filed 16 days late would be deemed timely).

The Seventh Circuit also failed to give adequate consideration to the fact that when Simmons filed her motion on October 21, 2002, K-Mart had not yet filed its plan of reorganization. In fact, the filing of its February 25, 2003 first amended plan was still months away. In *O'Brien*, the Third Circuit explained that the *only* reason the length of the delay had any relevance in that case was because the plan had become effective during the "delay." *See O'Brien*, 188 F.3d at 129-30. Moreover, throughout its bankruptcy case, K-Mart has been engaged in a long and methodical claims objection process and personal injury claims resolution procedure. K-Mart has also allowed itself ample time both before and after plan confirmation to resolve claim issues. Therefore in K-Mart's case, unlike *O'Brien*, there has been no urgency with respect to the resolution of claims. No event in K-Mart's case lends any significance to either the day-late receipt of the claim or the length of the delay in filing the motion. The Seventh Circuit also erred by affirming that aspect of the Bankruptcy Court and District Court's decisions.

IV. The Seventh Circuit Erred By Affirming The Lower Courts' Decisions Based Upon A Factual Distinction That Had No Basis In The Record And Which Was Not Applied To Similarly Situated Claimants.

In considering the denial of Petitioner's Motion to be included in the Supplemental Bar Date, the Seventh Circuit acknowledged that Petitioner was similarly situated to those claimants to whom the Supplemental Bar Date applied because she was not listed on K-Mart's schedules and never physically received notice of the initial Bar Date from K-Mart. (App. at 12.) Despite this fact, the Seventh Circuit concluded that she was distinguishable from the other claimants solely because her counsel had actual knowledge of the initial Bar Date and therefore that the Bankruptcy Court's denial of Petitioner's Motion was not an abuse of discretion. (*Id.*)

This aspect of the Seventh Circuit's opinion was also erroneous because absolutely no basis in the record exists to support the factual conclusion that the other Supplemental Bar Date claimants or their attorneys did not likewise have actual knowledge of the initial Bar Date. K-Mart has never asserted that it combed through the list of those claimants and weeded out those, like Simmons, who were represented by counsel who also represented other parties in the case or that it took any other steps to determine whether the claimants had actual knowledge of the Bar Date. Therefore, the Seventh Circuit had no basis for distinguishing Petitioner from all of the other claimants included in the Supplemental Bar Date. Its decision in this regard is erroneous.

Bankruptcy courts may not engage in disparate treatment of creditors of the same class. *See, e.g., In re AOV Industries, Inc., et al.*, 792 F.2d 1140, 1154-55 (D.C. Cir. 1986). In this case, this principle was violated when the

Seventh Circuit unfairly required Petitioner to prove that she met additional *de facto* requirements for eligibility for the Supplemental Bar Date, but did not require similarly situated creditors to make such a showing. The Seventh Circuit's refusal to place Petitioner on equal footing with other similarly situated creditors results in great prejudice to Simmons without any basis in law or fact. The Seventh Circuit erred in this regard as well.

CONCLUSION

Bankruptcy claimants are required to follow the rules, but the rules include an excusable neglect exception which assumes that mistakes will be made and which requires courts to liberally construe the doctrine to avoid forfeitures by creditors. In this case, it is the Seventh Circuit who did not follow the rules. It ignored all notions of leniency, ran roughshod over numerous principles of law, and created a split among the Circuits, in order to hold that a one-day late filing resulting from a clerk's mistake in sending a claim two-day air rather than next day air did not qualify as "excusable neglect." This Court should grant Wilhemina Simmons's Petition for writ of certiorari.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-4084

In the matter of: KMART CORPORATION, *et al.*,

Debtors-Appellees,

Appeal of: WILHEMINA SIMMONS,

Appellant.

Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division.
No. 03 C 96—Amy J. St. Eve, *Judge.*

ARGUED APRIL 9, 2004—DECIDED AUGUST 27, 2004

Before BAUER, EASTERBROOK, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.*

I. Background

Kmart, Corp. filed a petition for relief under Chapter 11 of the Bankruptcy Code on January 22, 2002 ("Petition Date"). On March 26, 2002, the bankruptcy court entered

an order establishing July 31, 2002 as the deadline for filing proofs of claim ("Original Bar Date" or "Bar Date"). *See* Fed. R. Bankr. P. 3003(c)(3) (The "court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed."). Later, upon Kmart's motion, the bankruptcy court established a supplemental bar date of January 22, 2003 ("Supplemental Bar Date") for a limited set of pre-Petition Date creditors who had not previously been sent notice of the Original Bar Date. *See id.*

Appellant Simmons suffered a fall in a Kmart store in St. Croix, U.S. Virgin Islands, on December 13, 2001. She sought to pursue a $750,000 pre-Petition Date personal-injury claim against Kmart based upon her accident, which she asserts was caused by a malfunctioning store door. Notice of the Bar Date was sent to Simmons at her address as listed in the files of Kmart's third-party claims administrator, Trumbull Services. The mailing was never returned to Kmart as "undeliverable." However, Simmons asserts that she never personally received the notice because the address used by Trumbull was not her actual mailing address. Nonetheless, it is undisputed that Simmons's attorney had actual knowledge of the Original Bar Date, as her counsel had filed timely proofs of claims for over two dozen other Kmart creditors.

Despite counsel's awareness of the Original Bar Date, Simmons's proof of claim was untimely, delivered to Kmart one day after the Bar Date on August 1, 2002. Apparently, on July 30, the day before the Bar Date, Simmons's attorney delegated to an office clerk the task of mailing Simmons's proof of claim. Unfortunately for Simmons, the clerk waited until around two o'clock in the afternoon before attending to the assignment. Either because of an oversight by the clerk or because the post office refused to guarantee a next-day delivery given the late hour, the clerk checked the box for "Second Day Delivery" on the mail delivery in-

structions and the package arrived one day later than Simmons and her attorney intended.

Moreover, although the claim form recommended that claimants include a self-addressed stamped envelope so that Trumbull could mail verification of its receipt of the form to the claimant, Simmons's attorney did not do so. Nor did counsel make any follow-up phone calls to ensure that the proof of claim was timely received. As a result, Simmons (through counsel) did not realize that her filing was late until September 23, 2002, when a notice from Kmart was received, informing Simmons that her claim was now barred. For unknown reasons, Simmons's attorney then waited until October 21, 2002 to move under Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure for Simmons's proof of claim to be deemed timely filed.[1]

Evaluating whether Simmons's late filing was the result of "excusable neglect" as required under Rule 9006(b)(1), the bankruptcy court considered the four factors established in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 395 (1993). On November 19, 2002, the court denied Simmons's motion to deem her claim timely filed.

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[1] Bankruptcy Rule 9006(b) provides:
Enlargement.

(1) In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect. (emphasis added)

Simmons again tried to avoid the effect of her late filing by moving to have her claim covered by the Supplemental Bar Date. On February 5, 2003, the court reasoned that because her attorney had actual notice of the Bar Date, Simmons could not properly be considered one of the limited set of creditors to whom the Supplemental Bar Date applied. The court denied Simmons this "second bite of the apple."

The district court consolidated her subsequent appeals and ultimately upheld both of the bankruptcy court's rulings. For the following reasons, we affirm.

II. Analysis

Our de novo review of the district court's decision to affirm the bankruptcy court allows us to assess the bankruptcy court's judgment anew, employing the same standard of review the district court itself used. *Corporate Assets, Inc. v. Paloian*, 368 F.3d 761, 767 (7th Cir. 2004) (citing *Frierdich v. Mottaz*, 294 F.3d 864, 867 (7th Cir. 2002)). The bankruptcy court's refusal to deem Simmons's claim timely filed will be overturned only in extreme cases, when the bankruptcy court has abused its discretion. *See In re Singson*, 41 F.3d 316, 320 (7th Cir. 1994). Likewise, we review the bankruptcy court's refusal to apply the Supplemental Bar Date to Simmons's proof of claims—a ruling essentially construing the import of the court's prior order establishing the Supplemental Bar Date—for an abuse of discretion. *See In re Weber*, 25 F.3d 413, 416 (7th Cir. 1994). In general terms, a court abuses its discretion when its decision is premised on an incorrect legal principle or a clearly erroneous factual finding, or when the record contains no evidence on which the court rationally could have relied. *Corporate Assets*, 368 F.3d at 767 (citing *United States v. Jain*, 174 F.3d 892, 899 (7th Cir. 1999); *Salgado by Salgado v. General Motors Corp.*, 150 F.3d 735, 739 & n.4 (7th Cir. 1998)).

A. Motion to Deem Simmons's Claim Timely Filed

As we noted above, because Simmons's proof of claim was filed one day after the Original Bar Date, she moved to have her claim deemed timely filed under Rule 9006(b). Under Rule 9006(b), a bankruptcy court may, in its discretion, grant such relief if the late filing was the result of "excusable neglect." In its 1993 *Pioneer* decision, *supra*, the Supreme Court established four factors to guide courts' excusable neglect analyses. Specifically, a court assessing whether to grant a motion under Rule 9006(b) to have a late-filed proof of claim deemed timely must evaluate "[1] the danger of prejudice to the debtor, [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was in the reasonable control of the movant, and [4] whether the movant acted in good faith." 507 U.S. at 395. Simmons does not dispute that the bankruptcy court correctly considered the four factors outlined by *Pioneer*. Instead, Simmons posits that the court's factual determinations with respect to each of the factors were clear error and that its ultimate decision to deny her Rule 9006(b) motion was therefore an abuse of discretion. We disagree.

1. Danger of prejudice to Kmart

The bankruptcy court determined that allowing Simmons's claim would cause prejudice to Kmart. Simmons aptly points out that Kmart's first amended plan of reorganization was filed on February 25, 2003 and confirmed on April 23, 2003, nearly eight months after the Original Bar Date. Therefore, the debtor Kmart, who had received Simmons's proof of claim on August 1, 2002, was on full notice of her claim and could have easily taken it into account when it drafted its reorganization plan (and in structuring any economic models used to create the plan). *Cf. O'Brien Envtl. Energy, Inc. v. NRG Energy, Inc. (In re O'Brien Envtl. Energy,*

Inc.), 188 F.3d 116, 126 (3d Cir. 1999) (laying out factors for assessing prejudice under *Pioneer*, including whether the debtor had knowledge of the claim at the time the reorganization plan was filed or confirmed, and whether the late filing would disrupt the plan or economic models used in the plan's development). Likewise, because the Supplemental Bar Date was in the offing at the time of Simmons's Rule 9006(b) motion, Kmart was indisputably still in the process of identifying other claimants. Hence, Simmons posits, there was no prejudice to Kmart as a result of Simmons's tardy filing.

The bankruptcy court did not address these particular facts in its *Pioneer* analysis, but instead emphasized Simmons's delay in bringing the Rule 9006(b) motion, which we address in detail below, and the size of her claim, $750,000, characterizing it as "no small amount." Allowing Simmons's late-filed claim could induce other similarly sized late-claimants to so petition the bankruptcy court. *See In re Specialty Equip. Cos. Inc.*, 159 B.R. 236, 239 (Bankr. N.D. Ill. 1993). And while it is true that Simmons's claim represents only a small fraction of the approximately $6 billion total of unsecured claims against Kmart, if the bankruptcy court allowed all late-filed claims of nearly a million dollars where a simple "innocent mistake" (see our detailed discussion of Simmons's "reason" for the delay below) was to blame for the tardiness of the proof of claim, we think Kmart could easily find itself faced with a mountain of such claims, with a corresponding price tag in the millions of dollars. Perhaps this would be a different case had Simmons's claim only asserted, say, $75,000 or $80,000 in damages. In any event, the bankruptcy court knew the total number of claims against Kmart, and still found that Simmons's claim was "no small amount." It was in the best position to assess the relative size of Simmons's claim, and she has presented us with no reason here to disturb that judgment.

To conclude, although we do not find the bankruptcy court's reasoning overwhelmingly persuasive, because, at a minimum, reasonable minds could disagree as to the potential for harm to Kmart as a result of Simmons's delay, and given that it was Simmons's burden to prove a lack of prejudice to Kmart and not the inverse, we cannot say the bankruptcy court's finding as to this *Pioneer* factor was clear error.

2. Length of the delay and its impact on judicial proceedings

Simmons's proof of claim was only one day late, a fact which seems to support the grant of her Rule 9006(b) motion. However, the bankruptcy court not only considered this one-day delay, but also how long it took Simmons to get around to requesting judicial relief. A total of *eighty-one* days lapsed between the Original Bar Date and Simmons's filing of her 9006(b) motion. Although Simmons could have easily ascertained whether her proof of claim made it from the Virgin Islands to the mainland United States on time by either including a self-addressed stamped envelope with her proof of claim (as the claim form encouraged claimants to do) or by making a follow-up phone call to Trumbull, she chose not to do so. In fact, Simmons didn't realize that her filing was late until she received a notice from Kmart, *fifty-three* days after the Original Bar Date. Even more perplexing, Simmons waited an additional twenty-eight days to make her Rule 9006(b) motion. The bankruptcy court was well within its province to consider the total eighty-one day period of delay, as the court may consider "all relevant circumstances" in its excusable neglect analysis. *Pioneer*, 507 U.S. at 395.

Simmons makes much of three late-filed administrative claims also involved in the Kmart Chapter 11 proceedings, with delays somewhat similar to Simmons's, which the bank-

ruptcy court allowed. However, Simmons failed to include the court's unpublished orders addressing these claims in her appendix to this court, and as such, we cannot verify the veracity of her argument. *Cf., Le Beau v. Libby-Owens-Ford Co.*, 727 F.2d 141, 147 (7th Cir. 1984) (parties relying on an unpublished order included such in appendix); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 763 n.4 (7th Cir. 1982) (same). Hence, we do not address it further except to say that these claims are distinguishable from Simmons because, according to her own brief, the three administrative claimants' Rule 9006(b) motions were not as tardy as Simmons's (two filing seventy days after the bar date, and one forty-eight days later).

Simmons also points to the fact that at the time of her Rule 9006(b) motion, the Supplemental Bar Date had not yet passed. But the due process concerns which necessitated the Supplemental Bar Date are not at all applicable to Simmons, *see infra* Part II.B.

Regardless, bar orders serve an indisputably integral purpose in facilitating reorganizations. The Second Circuit put it well:

> A bar order serves the important purpose of enabling the parties to a bankruptcy case to identify with reasonable promptness the identity of those making claims against the bankruptcy estate and the general amount of the claims, a necessary step in achieving the goal of successful reorganization. . . . If individual creditors were permitted to postpone indefinitely the effect of a bar order so long as adversary proceedings were pending, the institutional means of ensuring the sound administration of the bankruptcy estate would be undermined.

In re Hooker Invs., Inc., 937 F.2d 833, 840 (2d Cir. 1991). Therefore, we conclude that the bankruptcy court's finding as to the length of delay and its concomitant negative impact on judicial proceedings was not clear error.

3. Reason for the delay

Simmons states in her brief to this court that "[t]he reason for the delay . . . was nothing more than an innocent mistake in mailing the claim." In particular, Simmons points to the mail clerk's inadvertent selection of second-day delivery (rather than next-day) on the mailing instructions. Kmart counters that the mail clerk was forced to choose the second-day delivery option because the clerk arrived—whether by his or her own dereliction of duty or otherwise—at the post office after two o'clock in the afternoon and next-day delivery could not be guaranteed. Under either scenario, Simmons correctly characterized it as a reason for the delay. But we think it a poor one.

Three of our sister circuits have held that fault in the delay is the preeminent factor in the *Pioneer* analysis. *See United States v. Torres*, 372 F.3d 1159, 1163 (10th Cir. 2004) (quoting *City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994) ("fault in the delay remains a very important factor—perhaps the most important single factor—in determining whether neglect is excusable.")); *Graphic Communications Int'l Union v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5 (1st Cir. 2001) ("We have observed that the four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import." (internal quotation marks and bracket omitted)); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000) (same). Although we have not yet similarly held, *see United States v. Brown*, 133 F.3d 993, 996 (7th Cir. 1998), in this case, the factor is immensely persuasive.

First, Simmons's counsel left the filing of her proof of claim until the latest possible time. Second, Simmons's attorney delegated the mailing responsibilities to a clerk. And counsel took no steps to follow up with the clerk to ensure that the proper procedures were used. Third, and as we referenced above, Simmons could have taken at least two simple measures to verify that her proof of claim ar-

rived on time. We agree with the bankruptcy and district courts—the delay in filing Simmons's proof of claim was entirely within her control. Put more directly, it was her own fault.[2] The bankruptcy court's finding as to this factor was not clear error.

4. Simmons's good faith

There is no dispute that Simmons attempted to file her proof of claim on time. However, we agree with the district court that "[i]t is not difficult to imagine stronger showings of good faith[3]." As we have highlighted above, Simmons's counsel left the filing of her proof of claim until the proverbial "eleventh hour," failed to follow up with the third-party claims processing agency to determine if the claim arrived on time, and then, after discovering that her proof of claim arrived after the deadline, waited nearly a month before seeking judicial relief. These efforts cannot be called extraordinary or even particularly diligent. Consequently, we find that this factor is inconclusive; it neither supports nor undercuts the bankruptcy court's ultimate determination.

To summarize our findings, the bankruptcy court's factual determinations as to each of the *Pioneer* factors it

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[2] As a general proposition and the for the purposes of the Rule 9006(b) "excusable neglect" analysis at issue here, the failings of the attorney may be attributed to the party. *Pioneer*, 507 U.S. at 396-97, *cited in In re Scheri*, 51 F.3d 71, 75 (7th Cir. 1995).

[3] The bankruptcy court made no express findings as to the good faith factor in its *Pioneer* analysis. Such an omission by the bankruptcy court does not, as Simmons suggests, necessitate that we remand for consideration of this factor. Our analysis demonstrates that the bankruptcy court did not abuse its discretion when it denied Simmons's Rule 9006(b) motion.

analyzed were not clear error. As such (and because the fourth factor, good faith, which was not addressed by the bankruptcy court, neither strongly hinders or helps Simmons's cause), we conclude that the court's decision to deny Simmons's Rule 9006(b) motion was not an abuse of discretion. Moreover, even if we did take issue with the bankruptcy court's determination as to the prejudice component (the only factual finding remotely questionable), given Simmons's reticence in rectifying the impact of the "innocent mistake" and that ultimately this mistake is attributable to no one except Simmons, the *Pioneer* factors would then be at an equipose, thus necessitating our affirmance of the bankruptcy court's ruling. Neither approach reveals any abuse of the bankruptcy court's discretion.

B. Motion to Apply the Supplemental Bar Date to Simmons's Claim

As required, Kmart initially sent notice of the Original Bar Date to approximately one million potential claimants, including those listed on Kmart's schedules of liabilities (which are filed with the bankruptcy court) and numerous others, who were unlisted.[4] After Kmart learned that it had inadvertently failed to send notice of the Bar Date to

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[4] Kmart explained that when it sent out this initial notice, its objective was to "make extra sure that we had noticed the world as broadly as possible," including not only clearly legitimate claimants, but also those Kmart believed had "no basis on which they could be construed creditors." Hence, notice was sent to both scheduled and unscheduled putative claimants. Kmart further explained that had it attempted to include all of these million possible claimants on the schedules which it filed with the bankruptcy court, such schedules would have been "about 100,000 pages long." Since, in Kmart's view, such a filing would be impracticable, none was attempted.

approximately 4,000 claimants, most of whom did not appear on Kmart's schedules, Kmart petitioned the bankruptcy court to establish the Supplemental Bar Date in an effort to rectify any due process problems—namely, that claimants without notice of Kmart's bankruptcy and the Bar Date might have irretrievably forfeited their rights. The bankruptcy court did so.

After Simmons's Rule 9006(b) motion was denied, she attempted to gain the benefit of the Supplemental Bar Date. The bankruptcy court denied this request as well, reasoning that Simmons should not be given a "second bite of the apple" because her attorney indisputably had actual knowledge of the Original Bar Date. In so ruling, the bankruptcy court in effect construed the meaning of its prior order establishing the Supplemental Bar Date. As such and as we stated earlier, we review the court's denial of Simmons's request only for an abuse of discretion. *See Taylor v. Prudential Sec. Inc. (In re VMS Sec. Litig.) (In re VMS Ltd. P'ship Sec. Litig.)*, 103 F.3d 1317, 1321 (7th Cir. 1996) (citing cases); *In re Weber*, 25 F.3d at 416.

Given our circumscribed review, we conclude without difficulty that the bankruptcy court did not abuse its discretion. In that Simmons was not listed on any of Kmart's schedules and never physically received notice of the Bar Date from the debtor (we assume *arguendo*), she was like many of the creditors to whom the Supplemental Bar Date applied. Nonetheless, she is distinguishable in one key respect. Simmons's counsel had actual knowledge of the Original Bar Date. And the attorney's knowledge is chargeable to the client. *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 92 (1990). *See also Pioneer*, 507 U.S. at 396-97; *In re Longardner & Assocs., Inc.*, 855 F.2d 455, 459 (7th Cir. 1988). In addition and as we noted above, the Supplemental Bar Date was established to alleviate potential due process problems. But because Simmons and her attorney both had

knowledge of the Original Bar Date, there was no such due process concern with respect to Simmons. The bankruptcy court's reasoning was sound, and its ruling was not an abuse of discretion.

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: August 27, 2004

Before
Hon. William J. Bauer, *Circuit Judge*
Hon. Frank H. Easterbrook, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*

No. 03-4084

In RE:	)	Appeal from the United
Kmart Corporation,	)	States District Court for
Debtor Appellee	)	the Northern District of
	)	Illinois, Eastern Division.
	)	
	)	No. 03 C 96
Appeal Of:	)	
Wilhemenia Simmons	)	**Amy J. St. Eve**, Judge.

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number:03 C 96 Date: October 27, 2003

Name of Assigned Judge: AMY J. ST. EVE

Case Title: SIMMONS VS. KMART CORP.

* * * * *

DOCKET ENTRY:

* * * * *

(10) ■ [Other docket entry] Enter Memorandum Opinion and order. The decision of the Bankruptcy Court is affirmed with respect to its denial of Appellant's motion to have her proof of claim deemed to be timely filed and its denial of Appellant's motion to be included in the supplemental bar date.

(11) ■ [For further detail see the order attached to the original minute order form.]

* * * * *

UNITED STATES DISTRICT COURT,
N.D. ILLINOIS, EASTERN DIVISION

Wilhemina SIMMONS, *Appellant*,	)	
	)	No. 03 C 0096
v.	)	
KMART CORPORATION, et al., *Appellees.*	)	**Amy J. St. Eve,** Judge.

MEMORANDUM OPINION AND ORDER

Appellant Wilhemina Simmons appeals the denial of two motions by the Bankruptcy Court for the Northern District of Illinois: (1) her Motion to Have her Proof of Claim Deemed to be Timely Filed ("First Motion"), and (2) her Motion to be Included in the Supplemental Bar Date ("Second Motion"). In the First Motion, Appellant argues that her delay in filing her proof of claim in Appellee's bankruptcy proceeding was the result of excusable neglect. In the Second Motion, Appellant argues that the Bankruptcy Court should have included her in a class of creditors who were never sent notice of the claims bar date. For the reasons stated below, the Court affirms the decision of the Bankruptcy Court on both motions.

STANDARDS

In the course of a district court's decision to affirm, modify, or reverse an order of a bankruptcy court, "[f]indings of fact . . . shall not be set aside unless clearly erroneous." Fed. R. Bankr.P. 8013. Accordingly, "if the trial court's account of the evidence is plausible in light of

the record viewed in its entirety, a reviewing court may not reverse even if convinced that it would have weighed the evidence differently as trier of fact." Matter of Love, 957 F.2d 1350, 1354 (7th Cir.1992) (quoting EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 309 (7th Cir.1988)). The Court reviews a bankruptcy court's decisions of law de novo. In re Newman, 903 F.2d 1150, 1152 (7th Cir.1990).

BACKGROUND

Simmons is a creditor of Appellees, debtors in bankruptcy, based on a personal injury claim of $750,000. (R. 8-1, Br. of Appellant p. 1.) The Bankruptcy Court established July 31, 2002, as the deadline for the filing of proofs of claim. The Bankruptcy Court proceedings would not include creditors filing after this claims bar date. Although located in the Virgin Islands, Simmons's attorneys waited until July 30, 2002, to attempt to file a proof of claim on behalf of Simmons. (Id.) On that day, a clerk at the law firm representing Simmons not only mailed the proof of claim two hours after the "next day" delivery deadline, but also designated the package for "second day" delivery. (Id.) As a result, the claims processing agent did not receive Simmons's proof of claim by the claims bar date, but rather, a day later. (R. 11-1, Br. of Appellee p. 3.) Although the proof of claim form recommended that creditors include a self-addressed, stamped envelope to confirm receipt, Simmons's attorneys did not do so. (Id.) Appellant, therefore, credibly claims that she did not know of her delinquency until the claims administrator sent notice of untimely filing on September 23, 2002. (Id. at p. 4.) Nearly a month later, on October 21, 2003, Simmons filed the First Motion requesting the Bankruptcy Court to allow her proof of claim under a theory of excusable neglect. (Id.) The Bankruptcy Court denied the First Motion, and Appellant subsequently filed the Second Motion, seeking to have the

later supplemental bar date applied to her claim. (Id.) The Bankruptcy Court also denied that motion. The appeal in this case followed.

ANALYSIS

I. The Excusable Neglect Standard

Simmons does not contest the fact that she filed her proof of claim one day late. Rather, she contends that her late filing was the result of "excusable neglect," which allows a court to permit a late filing according to Bankruptcy Rule 9006(b).

> [W]hen an act is required . . . to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion . . . (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr.P. 9006(b). In determining whether excusable neglect exists, a court should consider "all relevant circumstances," including the following factors: (1) the danger of prejudice to the debtor, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395, 113 S.Ct. 1489, 1498, 123 L.Ed.2d 74 (1993) (noting that "the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission").

II. The Bankruptcy Court's Denial of Excusable Neglect

A. Prejudice to the Debtor

Citing the amount of the claim at issue, and the large number of total claims asserted against the Appellees, Judge Sonderby found that the day-late filing was prejudicial to the debtor. (R. 11-1, App. to Appellee's Br. Ex. A, pp. 126- 127.) Appellant points out that the Bankruptcy Court allowed "numerous other late-filed claims to be deemed timely, including one claim in the amount of $400,000." (R. 13-1, Appellant's Reply Br. p. 2.) With respect to that particular claim, however, the Bankruptcy Court specifically allowed the late-filed claim "primarily because there [was] a minor involved." (R. 11-1, App. to Appellee's Br. Ex. H, p. 123.) The $400,000 claim, and the other claims cited by the Appellant, are factually distinguishable from Appellant's claim. The simple fact that the Bankruptcy Court allowed distinguishable late-filed claims does not support the argument that Simmons's late filing did not prejudice Appellees.

Simmons also argues that her claim constitutes the "merest fraction" of the total claims asserted against Appellees, and therefore could not prejudice the Appellees. This argument is similarly unavailing. The Bankruptcy Court knew of the total number of claims against Appellees, and still found that Appellant's claim was "no small amount." Appellant has not presented any controlling case law, and this Court has found none, supporting Appellant's argument that the relative amount of her claim renders it non-prejudicial. The Bankruptcy Court's finding of prejudice is not clearly erroneous.

B. Length of Delay, And Its Potential Impact on Judicial Proceedings

Appellant argues that the Bankruptcy Court did not specifically consider the fact that Appellant filed her proof of claim only one day late, and that the court therefore ruled in error. In support of this argument, Appellant identifies several cases in which courts have found excusable neglect for filings made as many as twenty days late. Pioneer, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74; In re Cendent Corp. Prides Litigation, 235 F.3d 176, 183 (3rd Cir.2000); In re Dartmoor Homes, Inc., 175 B.R. 659, 666-67 (Bankr.N.D.Ill.1994); In re Humblewitt Farms, Inc., 23 B.R. 703, 705 (S.D.Ill.1982). The only controlling case that Appellant cites is Pioneer, in which the Supreme Court held that courts must take into account all relevant circumstances in excusable neglect cases. Pioneer, 507 U.S. at 395. While the Bankruptcy Court may not have expounded upon the effect of a one-day late filing, it appears to have considered the effect of this delay and the subsequent delay by Appellant in filing a motion. (R. 11-1, App. to Appellee's Br. Ex. A, pp. 126-127.) Further, Simmons does not contest the fact that the proof of claim form directed her attorneys to include a self-addressed, stamped envelope with the proof of claim, and they neglected to do so. Thus, the entire delay between the day-late filing and the filing of the First Motion can be traced to Simmons's actions. Based on the record before the Bankruptcy Court, it is not clearly erroneous to conclude that Appellant's delays support a denial of excusable neglect.

C. Reason for Delay

Judge Sonderby also found that the delay in filing was entirely in Simmons's control. (R. 11-1, App. to Appellee's Br. Ex. A, pp. 126-127.) This finding is also not clearly erroneous, as Appellant does not dispute that her attor-

neys waited until the "last minute" to prepare the filing. (Id.) Appellant argues that the neglectful actions of her attorneys' mail clerk caused the delay in filing. At the hearing, however, Appellant had the opportunity to explain why she had waited until the day before the proof of claim was due before attempting to file. Appellant's attorney answered, "I can't answer. I only know that's when they prepared it. That's when they gave it to the clerk to file." (Id. at p. 122.) In choosing to focus on the mail clerk's actions, Appellant ignores the months during which she could have timely filed her proof of claim. The Bankruptcy Court's finding that the delay fell within Appellant's control is not clearly erroneous.

D. Appellant's Good Faith

Appellant also finds fault with the Bankruptcy Court's failure to consider the Appellant's good faith. Appellants concede that "if the other Pioneer factors weigh against the claimant, the one factor addressing good faith will not alone be the determining factor." (R. 13-1, Appellant's Reply Br. p. 9.) Pioneer, 507 U.S. at 398. At best, the record shows that Appellant waited until the day before the claims bar date to attempt to send proof of a $750,000 claim from the Virgin Islands to Connecticut. It is not difficult to imagine stronger showings of good faith. Even though the Bankruptcy Court did not discuss the Appellant's good faith, or lack thereof, in its holding, it is not clear that the court did not consider that factor. Regardless, even assuming that the record shows some amount of good faith on the part of Appellant, this factor does not overcome the totality of the circumstances in this case.

III. The Bankruptcy Court Did Not Err in Denying the Second Motion

A. The Supplemental Claims Bar Date

Pursuant to the Bankruptcy Court's order, Appellees sent notice of the original claims bar date to approximately one million potential claimants. (R. 11-1, App. to Appellee's Br. Ex. E, p. 4.) Subsequently, Appellees learned that they had inadvertently failed to send notice of the claims bar date to approximately 4,000 claimants. (Id. at 5.) To remedy this oversight, and to sooth due process concerns, Appellees moved the Bankruptcy Court to establish the supplemental claims bar date, which would ensure that those claimants who had not been sent notice of the claims bar date would have a later opportunity to file proofs of claim. Appellee did not include Appellant in the schedule of supplemental bar date claimants. Appellant sought to be included as such a claimant after her First Motion failed. The Bankruptcy Court refused, characterizing Appellant's Second Motion as a second bite of the apple.

B. Notice Issue

Appellant contends that although Appellees did attempt to send her notice of the original claims bar date, they sent it to an incorrect address, and as a result she never received personal notice. Accordingly, as a creditor that did not appear on the debtors' schedule, she argues that the Court should count her among the supplemental bar date claimants. Appellee objects that the supplemental claims bar date is for those claimants that were not sent notice, and because Appellee sent notice to the address in their records, Appellant does not qualify for the supplemental claims bar date.

Appellees offer several other objections, one of which contends that notice to Appellant's attorneys is imputed to

Appellant herself. In response, Simmons contends that because the attorneys in question were not on file as her attorneys of record, their actual admitted notice cannot be imputed to her. Appellant's position is subtle, but unsustainable. While Simmons now claims that the noticed attorneys were not her attorneys of record,[1] she has never claimed that they did not represent her at the relevant time. She has never claimed that there was no attorney-client relationship. Further, at some point before the original claims bar date, the noticed attorneys must have begun acting on behalf of Simmons, as Simmons's attorney admitted at hearing that the attorneys had notice of the claims bar date. In the absence of any evidence of prejudice to Appellant, this Court imputes the actual notice of Simmons's attorneys to Simmons herself for the purpose of determining whether or not Appellees should have included her in the supplemental claims bar date. See In re Marino, 195 B.R. 886, 895 (Bankr.N.D.Ill.1996) (holding that "[i]t is well recognized that an attorney's actual notice of the pendency of a bankruptcy may be imputed to his client if it occurs within the scope of the attorney-client relationship"); People ex. Rel. Hartigan v. Peters, 871 F.2d 1336, 1340 (7th Cir.1989) (examining constitutionality of hearing notice and noting that "[w]ith regard to due process, the Supreme Court has directed us to look at the totality of circumstances in determining whether notice was reasonable").

The supplemental claims bar date existed to protect the rights of those claimants who were not sent notice of the claims bar date. (R. 11-1, App. to Appellee's Br. Ex. E, p. 4.) Appellant had notice of the claims bar date and is not in need of the protection of the supplemental claims bar

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[1] Simmons failed to raise this argument in connection with the First Motion.

date. The Bankruptcy Court did not err in refusing to apply the supplemental claims bar date to Simmons.

CONCLUSION

The Bankruptcy Court correctly denied Appellant's Motion to Have Her Proof of Claim Deemed to be Timely Filed and her Motion to be Included in the Supplemental Bar Date. Affirmed.

Dated: Oct. 27, 2003